Petition

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM E. TAPP, PETITIONER

v.

ED LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Former Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED FOR REVIEW

(A) Whether a second trial was improper and in violation of the double jeopardy provision of the Fifth Amendment when the Mississippi Supreme Court stated that the legally competent evidence at the first trial was insufficient to sustain a conviction?

(B) Whether a State Supreme Court can order that a defendant be re-sentenced

for manslaughter on a conviction for murder in a second trial when the second trial was illegal and unconstitutional under the holding of this Court in Price v. Georgia, 398 U. S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970)?

II

PARTIES TO THE PROCEEDING

William E. Tapp, Petitioner; Ed Lucas, Warden of the Mississippi State Penitentiary; and Denver Sowell, Sheriff of De-Soto County, Mississippi.

III

TABLE OF CONTENTS

Questions Presented For Review. 1

Parties to the Proceeding 2

Table of Contents 2

Table of Authorities. 3

Cases. 3

Statutory Provisions 4

Others 4

Reference to Reports in Courts Below. 4

Jurisdiction. 5

Constitutional Provisions Involved. 5

Statement of the Case 7

Reasons for Allowing Writ 10

Conclusion. 22

Certificate of Service. 24

Appendix. 25

TABLE OF AUTHORITIES

CASES

Burks v. United States, 437 U.S. 1, S.Ct. 2141, 57 L.Ed. 2d 1 (1978)

Crist v. Bretz, 437 U.S. 28 (1977)

Graham v. Smith, 602 F.2d 1078 (1979)

Greene v. Massey, 437 U.S. 19, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978)

Greene v. Massey, 595 F. 2d 221 (1979)

Hudson v. State of Louisiana, 101 S. Ct. 970 (1981)

Pacelli v. United States, 588 F. 2d 360 (1978)

Price v. Georgia, 398 U. S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970)

Tapp v. State, 347 So. 2d 974 (Miss. 1977)

Tapp v. State, 347 So. 2d 1029, 1031 (Miss. 1979)

STATUTORY PROVISIONS

Miss. Code Ann. §13-1-5 (1972)

28 U. S. C., §1254(1)

28 U. S. C., §2254

OTHERS

Rules 19 and 20 of the United States Supreme Court

Fifth Amendment to the United States Constitution

V

REFERENCE TO REPORTS IN COURTS BELOW

The first conviction of Petitioner was heard on appeal by the Mississippi Supreme Court and reported at 347 So. 2d 974 (1977), and the second conviction was heard on appeal by that Court and reported at 373 So. 2d 1029 (1979).

VI

JURISDICTION

The opinion and judgment of The United States Court of Appeals For The Former Fifth Circuit were entered on October 7, 1981. This Petition For A Writ of Certiorari is timely filed within sixty days of the entry of the judgment by The United States Court of Appeals For The Former Fifth Circuit. Jurisdiction is invoked pursuant to the provisions of 28 U. S. C., §1254(1) and Rules 19 and 20 of this Court.

VII

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice

put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Amendment V, United States Constitution. (Emphasis Added).

VIII

STATEMENT OF THE CASE

The Petitioner was first indicted by the Grand Jury of DeSoto County, Mississippi, in November, 1975, charging him with the murder of his stepson in August, 1975. He was tried in Circuit Court the same month of his indictment and convicted of the lesser offense of manslaughter on November 26, 1975, and sentenced to serve a term of twenty years in the State Department of Corrections.

The case was appealed to the Mississippi Supreme Court and on July 6, 1977,

that Court reversed his manslaughter conviction and remanded the case to the Circuit Court of DeSoto County for a new trial.

Over objection by Petitioner, he was again tried for and convicted of murder on February 17, 1978, and sentenced to life imprisonment. His case was again appealed to the Mississippi Supreme Court and on August 8, 1979, that Court affirmed the conviction but changed it from murder to manslaughter and remanded the case to the Circuit Court for sentencing. Petitioner was then sentenced to serve a term of seventeen years in the State Department of Corrections on October 26, 1979.

Petitioner's Attorney, at that time, did not seek to have this Court review the decision of the Mississippi Supreme Court. When Petitioner employed his present Attorney, the time for seeking a Writ of Certiorari to the Supreme Court of Missis-

sippi had expired, so a Petition for a Writ of Habeas Corpus was filed in The United States District Court For The Northern District of Mississippi, on May 16, 1980, pursuant to the provisions of 28 U.S.C. §2254, and this Petition set out two separate and distinct violations of the double jeopardy provision of the Fifth Amendment in the prosecution of the Petitioner in the State Courts of Mississippi.

The District Court referred the matter to a United States Magistrate, who on September 22, 1980, recommended that the Petition be granted. On October 15, 1980, the District Court entered an order granting a Writ of Habeas Corpus and adopting the Report and Recommendation of the United States Magistrate as the opinion of the Court.

The Respondents appealed to The United States Court of Appeals For The Former Fifth Circuit, and that Court reversed the District

Court in an opinion and judgment entered on October 7, 1981. It is from that decision that Petitioner seeks relief in this Court.

In Petitioner's first trial, his wife, over objection, was compelled to testify against him in violation of §13-1-5 of the 1972 Mississippi Code Annotated. In reversing his manslaughter conviction from his first murder trial, the Mississippi Supreme Court stated that without the inadmissible testimony of his wife, the record on the first trial of the case would not sustain a conviction. However, the Mississippi Supreme Court remanded the case for a new trial and, over objection, the Petitioner was again tried for murder and, at his second trial, convicted of murder. He and his wife were divorced prior to his second trial and she was a voluntary witness against him at the second trial. Petitioner again appealed and pointed out to

the Mississippi Supreme Court that on his first appeal, they had said that the admissible evidence would not sustain a conviction in his first trial, but the Mississippi Supreme Court held that his first conviction had been reversed by that Court for trial error rather than insufficient evidence. Petitioner also argued that his second trial for murder was an illegal and unconstitutional trial based upon this Court's decision in Price v. Georgia, 398 U. S. 323 (1970). The Mississippi Supreme Court held that it could cure this defect by affirming his conviction on manslaughter rather than murder. The District Court agreed with Petitioner on both issues, but the Court of Appeals reversed the decision of the District Court.

IX

REASONS FOR ALLOWING WRIT

The Mississippi Supreme Court, on the first appeal (Tapp v. State, 347 So. 2d

974) said that the Trial Court erred permitting the wife to be called, over objection, to testify and the opinion says:

> "Without the wife's testimony the record on the first trial of this case would not sustain a conviction. However, since that testimony is incompetent, the case will be reversed and remanded for a new trial upon such other evidence as the State may be able to present," at page 977.

The Fifth Amendment, at this point, required a dismissal of the charge and acquittal of the Petitioner. If the Trial Court had correctly ruled at the first trial, the Petitioner would have been acquitted because only the incompetent evidence of the wife supported the verdict. The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceedings. The prosecution may not make repeated efforts to convict an individual for an alleged offense. When

there is a failure of proof at the trial, the only just remedy is for acquittal and this is true both at the trial level and the appellate level or, otherwise, the defendant is twice placed in jeopardy for the same alleged offense.

Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1, (1978) and Greene v. Massey, 437 U.S. 19, 98 S. Ct. 2151, 57 L. Ed. 2d 15, (1978), are exactly in point on the question of double jeopardy where the case is reversed for insufficient evidence. Burks, at his trial for bank robbery, defended on the ground of insanity. He was found guilty and the United States Court of Appeals reversed, holding the United States had not fulfilled its burden of proving sanity beyond a reasonable doubt and rather than terminating the case, remanded to the District Court for determination whether a directed verdict of acquittal should be entered or a new trial

ordered.

On certiorari, this Court reversed, saying, in the opinion written by Chief Justice Burger, that (1) the Double Jeopardy Clause of the Fifth Amendment precluded a second trial when conviction in a proper trial was reversed by the reviewing court solely for lack of sufficient evidence to sustain the jury's verdict, even though the defendant sought a new trial as one of his remedies, or even as the sole remedy, and (2) the only "just" remedy in such a case was the direction of a judgment of acquittal.

Of course, on his second appeal (Tapp v. State, 373 So. 2d 1029, (1979), the Burks and Greene cases, cited supra, had already been decided by the United States Supreme Court, and the Mississippi Supreme Court stated that the first conviction had been reversed for "trial error" rather than "evidentiary insufficiency." However, it

is respectfully submitted by Petitioner that where the Supreme Court of the State admitted in his first appeal that there was not enough evidence in the record to sustain a conviction without the inadmissible testimony of his wife, and then when that same Court on his second appeal stated that the first conviction had been reversed because of trial error, then the Federal Courts reviewing the case should take a long look at what has transpired, in order to make certain that State Courts, through the use of semantics, cannot trample on or ignore the constitutional rights of Petitioner or others as are guaranteed and secured by the Fifth and Fourteenth Amendments to the United States Constitution.

The fact that the decisions in the Burks and Greene cases are still alive and well today is attested to by the recent decision of the United States Supreme Court in the case of Hudson v. State of Louisiana,

101 S. Ct. 970, (1981). Hudson was tried in Louisiana State Court for first degree murder, and the jury found him guilty. He then moved for a new trial. The Trial Judge granted the motion stating: "I heard the same evidence the jury did; I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt to sustain the verdict of the homicide committed by this defendant of this particular victim." The State contended that Burks did not control this particular case. The State argued that the Trial Judge granted a new trial only because he entertained personal doubts about the verdict, and the Louisiana Supreme Court agreed. Then, at Hudson's second trial, the State presented an eyewitness whose testimony it had not presented at the first trial. The second jury also found Hudson guilty.

This Court in reversing the Supreme Court of the State of Louisiana held:

> "The Trial Judge granted the new trial because the State had failed to prove its case as a matter of law, not merely because he, as a "thirteenth juror," would have decided it differently from the other twelve jurors. Accordingly, there are no significant facts which distinguish this case from Burks and the Double Jeopardy Clause barred the State from prosecuting petitioner a second time."

Just as the State of Louisiana could not have a second bite of the apple by producing an eyewitness at the second trial in order to bolster and successfully prosecute its case, the State of Mississippi could not use the admissible testimony of the ex-wife at the second trial when the evidence at the first trial was insufficient without her inadmissible testimony.

The Court of Appeals relied on its decision in Greene v. Massey, 595 F. 2d 221, (1979), which held that no Court is better equipped to interpret its decision than the Court that rendered it and that Appellate Courts should ordinarily not be

required to decide the question of the sufficiency of the evidence. Of course, in that case, it was unclear as to whether there had been or had not been sufficient evidence to convict. However, the Hudson case cited, supra, shows that the United States Supreme Court will not hesitate to exercise its rights to review on the question of sufficiency of the evidence when a lower Court has given an erroneous decision, even if lower Courts are better equipped to interpret their own decisions.

In this case, the Mississippi Supreme Court unquestionably found that there was insufficient, admissible, evidence to convict Petitioner at his first trial, but then stated, on his second appeal, that his first conviction had been reversed for "trial error" rather than "evidentiary insufficiency."

In the case at bar, the Court of Appeals determined that in the Burks and

Greene cases, the United States Supreme Court had failed to decide the "more difficult question" of whether a second trial is improper when the legally competent evidence at the first trial was insufficient to sustain a conviction, and that Burks and Greene dealt with the easier question of whether the first conviction had been reversed on the basis of trial error or for insufficient evidence.

The Court of Appeals decided that the "more difficult question" had been a pretermitted issue by this Court in Burks and Greene and that the lower Court was, therefore, bound by the statement of the Mississippi Supreme Court that the reversal of Petitioner's first conviction was for trial error.

Petitioner does not see this issue as being pretermitted in Burks and Greene or as being a question this Court did not deal with. However, if such be the case, Peti-

tioner submits that reason, logic, and justice dictate that where there is an admission that the evidence was insufficient to support a conviction, then there should be a judgment of acquittal even if the Appellate Court is justified in reversing for trial error also.

The second important question is the issue of whether or not a second trial, barred by the Fifth Amendment, can become sanctioned legally by the actions of an Appellate or Review Court. The Court of Appeals, by relying on two Second Circuit cases, Graham v. Smith, 602 F. 2d 1078, (1979), and Pacelli v. United States, 588 F. 2d 360, (1978), determined that the Mississippi Supreme Court could rehabilitate such an unconstitutional trial by vacating an improper conviction and entering a conviction for the only offense for which Petitioner should have been tried since in his case the Petitioner could not

have been prejudiced by jury compromise or prejudiced before the Mississippi Supreme Court. The fact that this Court denied certiorari in both Graham and Pacelli, would lend support to the position the Court of Appeals took in this case.

However, this Court in Price v. Georgia, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970), held that:

> "The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first degree murder is an ordeal not to be viewed lightly." (Emphasis added).

In Crist v. Bretz, 437 U.S. 28 (1977), this Court held that the federal rule that jeopardy attaches when the jury is empanelled and sworn is applicable to the States under the Fifth Amendment. Accordingly, Petitioner believes that double jeopardy came into existence after the jury was

empanelled and sworn for his second trial for murder and that everything that happened thereafter was unconstitutional and a legal nullity and was incapable of rehabilitation or legal sanction.

In the second appeal of Petitioner, Tapp v. State, 373 So. 2d 1029, (1979), at pages 1032 and 1033, Chief Justice Patterson of the Mississippi Supreme Court in a dissenting opinion discussed Price v. Georgia and expressed his opinion about the unconstitutional second trial of Petitioner in the present case when he referred to Price and said:

> "If these statements mean what they say, then the second trial for murder should not have transpired; it was barred, thereby leaving the verdict of murder and the sentence of life thereunder a nullity, in my opinion. A remand for sentence for the crime of manslaughter lends dignity to an unconstitutional trial that I am not willing to share."

In Price, the State convinced the

Georgia Supreme Court that the defendant had not been a victim of double jeopardy because the jury verdict of the lesser offense cured or made constitutional his unconstitutional trial for murder, but this Court would not accept such a preposterous assertion. Likewise, it is respectfully submitted that the decision of the Mississippi Supreme Court to reduce the conviction from murder to manslaughter cannot make legal or constitutional a trial that was admittedly unconstitutional in Petitioner's case.

X

CONCLUSION

The Court of Appeals held that there is an issue in this case that has not been dealt with or has been pretermitted by this Court in prior decisions. If this be true, then the Court should address the question and clarify it once and for all because of its constitutional import. Also, the Court

of Appeals for the Former Fifth Circuit decided the second issue in this case contrary to the holding of this Court in Price v. Georgia, but in accordance with Pacelli and Graham from the Second Circuit. This issue should also be clarified and since we are dealing with not one but two separate violations of the double jeopardy provision of the Fifth Amendment in this case, it is extremely important for the Writ to be allowed. What has occurred in this case might be more appropriately called quadruple rather than double jeopardy.

Respectfully submitted,

Robert G. Gilder
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Robert G. Gilder, Attorney for Petitioner, William E. Tapp, do hereby certify that I have this day mailed, postage prepaid, copies of the foregoing Petition For Writ of Certiorari to Honorable Robert D. Findley, Special Assistant Attorney General, P. O. Box 220, Jackson, MS 39205 and to the Solicitor General, Department of Justice, Washington, DC 20530.

This the 2nd day of December, 1981.

Robert G. Gilder

ROBERT G. GILDER

Appendix

APPENDIX A

FORMER FIFTH
TAPP v. LUCAS

William E. TAPP, Petitioner-Appellee,

v.

Ed LUCAS, Warden, Mississippi State Penitentiary, et al., Respondents-Appellants.

No. 80-3859.

United States Court of Appeals
Fifth Circuit*
Unit A

Oct. 7, 1981

State appealed from an order of the United States District Court for the Northern District of Mississippi, Orma R. Smith, J., granting petition for writ of habeas corpus. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) although in reversing habeas corpus petitioner's first conviction on ground that his wife should not have been forced to testify against him, state Supreme Court had remarked that without the wife's testi-

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 24, 1980.

mony there was not sufficient evidence to sustain his conviction, the state Supreme Court's subsequent explanation on petitioner's appeal from his conviction on retrial that the reversal of the first conviction was for trial error was conclusive and, thus, the second trial was not precluded by the double jeopardy clause, and (2) where habeas corpus petitioner's manslaughter conviction in a trial in which prosecution had sought a murder conviction was reversed and on retrial petitioner was convicted of murder, double jeopardy clause was not violated by the state Supreme Court's remand of the murder conviction with instruction that the petitioner be sentenced for manslaughter.

Reversed and remanded.

1. Criminal Law 193

Although in reversing habeas corpus petitioner's first conviction on ground that his wife should not have been forced

to testify against him, state Supreme Court had remarked that without the wife's testimony there was not sufficient evidence to sustain his conviction, the state Supreme Court's subsequent explanation on petitioner's appeal from his conviction on retrial that the reversal of the first conviction was for trial error was conclusive and, thus, the second trial was not precluded by the double jeopardy clause. U.S.C.A.Const. Amend. 5.

2. Criminal Law 193 1/4

Where habeas corpus petitioner's manslaughter conviction in a trial in which the prosecution had sought a murder conviction was reversed and on retrial petitioner was convicted of murder, double jeopardy clause was not violated by state Supreme Court's remand of the murder conviction with instructions that petitioner be sentenced for manslaughter. U.S.C.A. Const. Amend. 5.

Appeal from the United States District Court for the Northern District of Mississippi.

Before CHARLES CLARK, TATE and SAM D. JOHNSON, Circuit Judges.

CHARLES CLARK, Circuit Judge.

The State of Mississippi brought this appeal from the grant of a writ of habeas corpus in favor of William E. Tapp. The case presents two questions concerning the proper interpretation of the double jeopardy clause: (1) whether a state court's explanation that its previous reversal of a criminal conviction was based on "trial error" rather than insufficient evidence permits retrial under Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L. Ed.2d 1 (1978), and (2) whether a state can order that a defendant be resentenced for manslaughter on a conviction for murder in a trial which was improper under Price v. Georgia, 398 U.S. 323, 90 S.Ct.

1757, 26 L.Ed.2d 300 (1970). We answer both questions in the affirmative, and we reverse the district court's grant of habeas corpus relief.

I.

In November 1975, Tapp was indicted for the murder of his wife's two-year-old son by a former marriage. The evidence at trial showed that Tapp abused the boy by beating him, kicking him, and throwing him to the floor, and that the child died of these injuries on the operating table. On the day after the boy's death, Mrs. Tapp left her husband and swore out an affidavit charging Tapp with child abuse. She remained separated from her husband until about 30 days prior to trial, when the couple was reconciled. At the time of trial, the Tapps were living together as man and wife, and Mrs. Tapp was reluctant to implicate Tapp in her son's death. Nevertheless, the prosecution subpoenaed

Mrs. Tapp and compelled her to testify against her will. Although the prosecution sought a murder conviction, the jury found Tapp guilty only of manslaughter.

Tapp's conviction was reversed by the Mississippi Supreme Court on the ground that his wife should not have been forced to testify against him. Cf. Miss. Code Ann. §13-1-5 (1972). In the course of its opinion, the court remarked,

> [w]ithout the wife's testimony, the record on the first trial of this case would not sustain a conviction. However, since that testimony is incompetent, the case will be reversed and remanded for a new trial upon such other evidence as the State may be able to present.

Tapp v. State, 347 So.2d 974, 977 (Miss. 1977). The court remanded the case and Tapp was again indicted and tried for murder, even though the first jury had found him guilty only of manslaughter. By the time of the second trial, Tapp and his wife were divorced, and Mrs. Tapp willingly

testified at trial. The jury found Tapp guilty of murder.

Tapp again appealed to the Mississippi Supreme Court, raising two challenges to his second conviction. First, Tapp claimed that the double jeopardy clause barred re-prosecution because his first conviction had been reversed for insufficiency of the evidence. See Burks v. United States, 437 U.S. 1, 15-16, 98 S.Ct. 2141, 2149, 57 L. Ed.2d 1, 12 (1978); Greene v. Massey, 437 U.S. 19, 24, 98 S.Ct. 2151, 2154, 57 L.Ed. 2d 15, 20 (1978). The Mississippi court rejected this contention, stating that, in spite of the language used in its earlier opinion, the reversal was based not upon insufficiency of the evidence but upon the trial court's error in compelling Tapp's wife to testify. Tapp v. State, 373 So.2d 1029, 1031 (Miss. 1979). Second, relying upon Price v. Georgia, 398 U.S. 323, 90 S. Ct. 1757, 26 L.Ed.2d 300 (1970), Tapp argued

that the double jeopardy clause barred his reprosecution for murder and limited any second prosecution to a charge of manslaughter. The Mississippi Supreme Court agreed that Tapp had been improperly retried for murder. To remedy this error, it remanded the case with directions to the trial court to impose a sentence based on a conviction for manslaughter. 373 So. 2d at 1031-32.

Tapp then sought federal habeas corpus. In addition to reasserting the double jeopardy claims made to the Mississippi Supreme Court, Tapp's petition for habeas corpus maintained that he could not be resentenced for manslaughter on his second conviction because the second jury had been prejudiced by the improper murder charge. The United States Magistrate granted the relief sought, and the district court adopted his recommendation.

II.

In Burks v. United States, 437 U.S. 1, 15-16, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1, 12 (1978), the Supreme Court held that the double jeopardy clause forbids retrial when the trial court or a reviewing court finds the evidence against the defendant insufficient to support a conviction. The Supreme Court recently has reiterated this principle in Hudson v. Louisiana, ——— U.S. ———, ———, 101 S.Ct. 970-972, 67 L. Ed.2d 30, 33 (1981). Under the Burks line of cases, however, reversal for insufficient evidence is to be distinguished from reversal for trial error. The Court made clear in Burks and its companion case, Greene v. Massey, 437 U.S. 19, 25-26, 98 S.Ct. 2151, 2155, 57 L.Ed.2d 15, 22 (1978), that where convictions are based on errors made in the course of the trial rather than on the government's failure to offer sufficient proof to sustain the conviction,

the double jeopardy clause does not preclude retrial. Neither Greene nor Burks decided the more difficult question whether a second trial is improper when the legally competent evidence at the first trial was insufficient to sustain a conviction. See Greene v. Massey, supra, 437 U.S. at 26 & n.9, 98 S.Ct. at 2155 & n.9, 57 L.Ed.2d at 22 & n.9.

[1] Tapp seeks to raise in this case the issue pretermitted in Burks and Greene. He notes the Mississippi Supreme Court's statement that "[w]ithout the wife's testimony, the record on the first trial of this case would not sustain a conviction", Tapp v. State, supra, 347 So.2d at 977, and concludes that his conviction was reversed because the legally competent evidence was insufficient. In remanding Tapp's case for the second time, however, the Mississippi Supreme Court observed that the first reversal "was based on trial error and not

insufficiency of evidence". Tapp v. State, 373 So.2d 1029, 1031 (Miss. 1979). Under Fifth Circuit precedent in Greene v. Massey, this dictum is conclusive evidence that the first reversal was based on trial error. The Supreme Court remanded Greene to this court because it was not clear whether the Florida Supreme Court had reversed Greene's conviction for trial error or for evidentiary insufficiency. See Greene v. Massey, supra, 437 U.S. at 26-27, 98 S.Ct. at 2155, 57 L.Ed.2d at 21. To resolve all doubts as to the proper interpretation of the state opinion, we certified the case to the Florida Supreme Court. See Greene v. Massey, 595 F.2d 221, 224 (5th Cir. 1979) ("[s]ince no one is better equipped to interpret its decision than the Court that rendered it, we find that this case is one that is particularly appropriate for certification.") Following Greene, we also defer to the state court's characterization of its

previous opinion. Because the Mississippi Supreme Court made clear that Tapp's first conviction was reversed for trial error, the issue pretermitted by Burks and Greene is not presented in this case, and Tapp's second trial was not precluded by the double jeopardy clause.

III.

[2] Citing Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), the district court also held that the double jeopardy clause was violated when the Mississippi Supreme Court remanded Tapp's murder conviction with instructions that Tapp be sentenced for manslaughter. In Price, as in this case, the defendant was retried for murder after a previous murder trial in which he had been convicted of manslaughter. In Price, however, the second jury again convicted the defendant only of manslaughter, and the Supreme Court held that the second conviction was

forbidden by the double jeopardy clause. 398 U.S. at 331, 90 S.Ct. at 1762, 26 L. Ed.2d at 306. Price required no showing of actual prejudice because of the serious risk that reprosecution for murder might have led to second jury to compromise by convicting the defendant of the lesser included offense of manslaughter rather than acquitting him of murder. Id.

This concern over possible jury compromise is not relevant to Tapp's reprosecution. Tapp concedes, as he must, that Price would permit his retrial on a manslaughter charge. See 398 U.S. at 327, 90 S.Ct. at 1760, 26 L.Ed.2d at 304. But the crime of manslaughter is identical to murder except for the degree of culpability required. Murder is homicide committed by "deliberate design" or with a "depraved heart." See Miss. Code Ann. §97-3-19 (1972). Manslaughter is homicide committed without malice. See Miss. Code Ann. §§97-3-25

through 93-3-47. The jury's verdict that Tapp was guilty of murder means a fortiori that the jury considered Tapp guilty of the lesser included offense of manslaughter as well. Thus, the possibility of prejudicial jury compromise is simply absent from this case. Moreover, there is nothing to suggest that the Mississippi Supreme Court was swayed by the presence of a murder charge which it recognized to be barred by the double jeopardy clause. The court's remand for resentencing on the lesser included manslaughter offense was a common sense solution to the problem of avoiding yet another trial for prosecution and defense. It was in no way inconsistent with the double jeopardy clause. Accord, Graham v. Smith, 602 F.2d 1078, 1082 (2d Cir. 1979); Pacelli v. United States, 588 F.2d 360, 366 (2d Cir. 1978).

The order of the district court is

reversed and the cause is remanded with directions to dismiss the petition for a writ of habeas corpus.

REVERSED AND REMANDED.

APPENDIX B

William E. TAPP

v.

STATE of Mississippi.

No. 49709

Supreme Court of Mississippi.

July 6, 1977

Defendant was convicted before the Circuit Court, DeSoto County, Dick R. Thomas, J., of manslaughter, and he appealed. The Supreme Court, Lee, J., held that: (1) trial court erred in compelling defendant's wife to testify over her objection and that of defendant; (2) trial court did not err in permitting physician who admitted child to hospital and who was present during his surgery to testify when surgeon who was named as state witness on list furnished defendant was unable to be present at trial, even though testifying physician was not listed as state witness and his name was not furnished to defendant prior to trial; (3)

trial judge did not abuse its discretion in admitting into evidence photographs of deceased child which reflected bruises and marks on his body and (4) without wife's testimony, record would not sustain conviction, but since that testimony was incompetent, case would be reversed and remanded for new trial.

Reversed and remanded.

Gillespie, C. J., filed dissenting opinion in which Robertson and Sugg, JJ., joined.

1. Criminal Law 1168(3)
Witnesses 52(8)

In manslaughter prosecution for death of two and one-half-year-old child of defendant's wife, it was reversible error for trial court to compel, in voilation of statute, defendant's wife to testify over objection of defendant and that of wife, who lived with defendant subsequent to her child's death, who minimized abu-

sive conduct of her husband, who expressed belief in his innocence and who stated that she loved him. Code 1972, § 13-1-5.

2. Criminal Law 629

In manslaughter prosecution for death of defendant's wife's child, trial court did not err in permitting physician who admitted child to hospital and who was present during surgery to testify when surgeon whose name appeared on list of State witnesses furnished defendant was unable to be present at trial, even though testifying physician was not listed as state witness and his name was not furnished to defendant prior to trial.

3. Criminal Law 1166(11)

No prejudice resulted to defendant as result of substitution of witnesses in manslaughter prosecution for death of defendant's wife's child, wherein trial court, after first hearing testimony in chambers and satisfying itself that testi-

mony was substantially same, permitted substitute witness, physician who had admitted child to hospital and who was present during child's surgery but whose name did not appear on list of state witnesses, to testify when child's surgeon who was named as State's witness on list furnished defendant was unable to be present.

4. Criminal Law 438(5)

Photographs of deceased child which reflected bruises and marks on his body had some probative value and trial judge did not abuse his discretion in admitting them into evidence, in manslaughter prosecution for death of child.

5. Criminal Law 1189

Without testimony of defendant's wife, who was erroneously compelled by trial court to testify against her husband in manslaughter prosecution for death of wife's two and one-half-year-old child, record would not sustain man-

slaughter conviction; however, since wife's testimony was incompetent, case would be reversed and remanded for new trial upon such other evidence as State might be able to present. Code 1972, § 13-1-5.

Walker, Franks, Rone, Bridgforth & Woods, Joel P. Walker, Mills E. Barbee, Hernando, for appellant.

A. F. Summer, Atty. Gen. by Frankie Walton White, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before GILLESPIE, C. J., and ROBERTSON and LEE, JJ.

LEE, Justice, for the Court.

William E. Tapp was convicted of manslaughter in the Circuit Court of DeSoto County, sentenced to twenty (20) years, and he appeals here. We reverse.

In view of the conclusion we have reached, we consider only the following

assigned errors:

(1) The trial court erred in compelling appellant's wife to testify over objection of him and his wife, in violation of Mississippi Code Annotated § 13-1-5 (1972).

(2) The trial court erred in permitting Dr. Harry Friedman to testify when he was not listed as a State witness, and his name was not furnished to appellant prior to the trial.

(3) The trial court erred in admitting in evidence pictures of the deceased child.

(4) The trial court erred in refusing appellant's request for a peremptory instruction of not guilty, and the jury's verdict is contrary to the overwhelming weight of the evidence.

Appellant is married to nineteen-year-old Mary Jane Tapp. On August 22,

1975, John Carlton Looney, her two and one-half (2 1/2) year old child by a former marriage lived with her and appellant. The evidence indicates that on the evening of August 20, appellant abused the child by striking and kicking him (with cowboy boots), squeezing him around the stomach, and throwing him down. The child became ill, was examined by Dr. Harry Friedman about 10:00 a. m. August 21, 1975, and was admitted to the hospital. The doctor found bruises over numerous parts of Carl's body, he did not respond to treatment, he was lethargic and delirious for the next twelve (12) hours, when he went into shock. An emergency operation was performed, but the child expired on the operating table at 4:00 a. m. August 22, 1975. An autopsy disclosed that the top part of the child's small intestine (duodenum) had separated from the stomach and fluids had drained into the abdominal

cavity causing infection. The injuries were the result of "blunt trauma." The damage was recent and was consistent with the abuse.

On the day after Carl's death, Mrs. Tapp made an affidavit against her husband for child abuse, and she was separated from him until approximately thirty (30) days before trial, at the end of which time they were reconciled and started living together again. At the time of the trial, in November, 1975, appellant and Mrs. Tapp were cohabiting as man and wife, she contended that he did not mean to harm the child, and she minimized the abusive acts formerly attributed to appellant. The State issued a subpoena for her at the November, 1975 Term of court, which she evaded. Subsequently, she appeared in court, was placed under bond as a material witness for the State and was compelled by the court to testify on behalf

of the State. A hearing was held outside the presence of the jury on appellant's objection to her testifying and she repeatedly told the court that she did not want to testify, that she did not wish to prefer charges against her husband, she did not believe him guilty, and that she was living with him. She agreed to be available to testify, if the judge would not keep her in jail. The court further declared her to be a hostile witness and permitted the State to call her and examine her as a hostile witness. Much of the examination was cross-examination and introduction of contradictory statements made by her at a preliminary hearing.

I

[1] Did the court err in compelling appellant's wife to testify over objection of him and his wife, in violation of Mississippi Code Annotated § 13-1-5 (1972)?

Mississippi Code Annotated § 13-1-5 (1972) reads as follows:

"Husbands and wives may be introduced by each other as witnesses in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them. A criminal prosecution of either husband or wife for contributing to the neglect or delinquency of a child or desertion or nonsupport of children under the age of sixteen (16) years or abandonment of children shall be deemed controversies between husband and wife for the purpose of this section. But in all other instances where either of them is a party litigant the other shall not be required to answer interrogatories or to make discovery of any matters involved in any such other instances without the consent of both." (Emphasis added).

The latest Mississippi case construing the statute is Merritt v. State, 339 So.2d 1366 (Miss.1976), where the wife testified against her husband for the murder of their child. The Merritt case is distinguishable from the present case. In Merritt, the father's crime against the child destroyed the harmony of the marriage and the conjugal relationship resulting in the separation of the husband and wife and ultimate divorce. Also, Mrs. Merritt voluntarily (and somewhat eagerly) testified on behalf of the State against her husband. In the case now before the Court, there is no charge against appellant for assaulting his wife (personal violence) as in Turner v. State, 60 Miss. 351 (1882) and for which the statute specifically grants an exception. Appellant's wife lived with him subsequent to the death of her child, she minimized the abusive conduct of her husband, expressed

her belief in his innocence, and stated that she loved him. Further, both she and appellant objected to her being called as a witness and being required to testify against appellant. She was placed under bond as a material witness, she was declared to be a hostile witness, and she was compelled to testify under threat of being jailed. We hold that there was a clear violation of Section 13-1-5 and is constituted reversible error.

II

[2,3] Did the trial court err in permitting Dr. Harry Friedman to testify when he was not listed as a State witness, and his name was not furnished to appellant prior to the trial?

At the request of appellant, a list of the witnesses for the State was furnished him. Among the witnesses named was Dr. Jerry Kaplan, who operated on the child. At the trial, Dr. Kaplan was un-

able to be present, and the State called and introduced Dr. Harry Friedman, who was the admitting doctor and who was present during the surgery. Appellant contends that the court erred in permitting Dr. Friedman to testify when he expected Dr. Kaplan to be introduced. Mississippi has no statute requiring the State to furnish names of its witnesses to a defendant. There is no merit in this contention. Bellew v. State, 238 Miss. 734, 106 So.2d 146 (1958); McDaniel v. State, 191 Miss. 854, 4 So.2d 355 (1941). Further, the court heard the witness testify in chambers and was satisfied that his testimony was substantially the same as that of Dr. Kaplan. No prejudice resulted to the appellant by substituting one physician for another.

III

[4] Did the trial court err in ad-

mitting in evidence pictures of the deceased child?

The court admitted in evidence pictures of the child which reflected bruises and marks on his body. These photographs had some probative value, and the judge did not abuse his discretion in admitting them in evidence. May v. State, 199 So.-2d 635 (Miss.1967).

IV

[5] Did the trial court err in refusing appellant's request for a peremptory instruction of not guilty and was the jury's verdict against the overwhelming weight of the evidence?

Without the wife's testimony, the record on the first trial of this case would not sustain a conviction. However, since that testimony is incompetent, the case will be reversed and remanded for a new trial upon such other evidence as the State may be able to present.

This case was considered by a conference of the justices en bane.

REVERSED AND REMANDED.

PATTERSON and INZER, P. JJ., and SMITH, WALKER and BROOM, JJ., concur.

GILLESPIE, C. J., and ROBERTSON and SUGG, JJ., dissent.

GILLESPIE, Chief Jusrice, dissenting:

In my opinion the wife of the defendant in the present case should be allowed to testify under the authority of Merritt v. State, 339 So.2d 1366 (Miss.1976). The difference in the two cases is that in Merritt the wife testified voluntarily, while in the present case, she was not a willing witness. The majority decision is in my opinion, unsound and out of harmony with Merritt.

In Merritt, the Court followed the modern trend of extending the area in which husband and wife may testify against each other effectively to enforce

the criminal laws. It was held that under the 1954 amendment [now a part of Mississippi Code Annotated § 13-1-5 (1972)], the legislature recognized the need to expand the area in which husband and wife can testify against each other. Specifically, Merritt held that a crime of personal violence against a child is a controversy between man and wife within the meaning of the statute. That holding revoked the immunity in child abuse cases including abuses resulting in death. Once the immunity is revoked, voluntariness or non-voluntariness has no part in applying the Merritt rule.

Child abuse is reaching proportions causing national concern. The courts can ill afford to make the voluntariness of the spouse's testimony the criteria for admitting such testimony in child abuse cases, particularly in cases where the parent is charged with murder of the child.

This will encourage the accused to intimidate the other spouse not to testify voluntarily. I apprehend that application of the rule laid down in the present case will invite intimidation and compound criminal activities in child abuse cases.

ROBERTSON and SUGG, JJ., join in this dissent.

APPENDIX C

William E. TAPP

v.

STATE of Mississippi.

No. 51252.

Supreme Court of Mississippi.

Aug. 8, 1979.

Defendant was convicted before the Circuit Court, DeSoto County, Dick R. Thomas, J., of manslaughter, and he appealed. The Supreme Court, Lee, J., 347 So.2d 974, reversed and remanded. The Circuit Court, DeSoto County, Dick R. Thomas, J., rendered judgment on jury verdict of guilty of murder, and defendant appealed. The Supreme Court, Bowling, J., held that: (1) second trial was not prohibited by double jeopardy clause; (2) second trial should have been under charge of manslaughter and in light of failure of trial court to so charge jury, case would be remanded for sentencing hearing, limited to that under

a charge and conviction of manslaughter; and (3) testimony of defendant's former wife was properly admitted.

Affirmed and remanded.

Patterson, C. J., dissented with opinion in which Broom, J., joined.

1. Criminal Law 193

Where reversal of defendant's conviction of manslaughter was because of error of trial court and admission of evidence of the wife because of her marital status at that time, reversal was based on trial error and not insufficiency of evidence and, thus, second trial was not barred by double jeopardy clause. U.S.C.A.Const. Amends. 5, 14.

2. Criminal Law 1044.2(1)

Where, prior to beginning of second trial, defendant, through his attorney, moved court to try case only under charge of manslaughter under rule that accused cannot be tried and convicted of crime

greater than that for which he was convicted at first trial, and where at conclusion of case court was requested by defendant's attorney to charge the jury that it could consider only a verdict of manslaughter, defendant's right to raise issue on appeal was sufficiently preserved in lower court.

3. Criminal Law 1181

Where defendant was convicted at first trial of manslaughter, he could not be convicted at second trial, after reversal of conviction, of murder and failure of court to so charge jury would require remand for sentencing hearing, limited to that under a charge and conviction of manslaughter.

4. Criminal Law 1208(2)

It shall be within discretion of lower court to adjudicate proper sentence after sentencing hearing.

5. Witnesses 64(1)

In prosecution for murder, admission of testimony of defendant's former wife,

which she gave voluntarily, was not error.

6. Criminal Law 369.2(4)

In prosecution for murder of two and a half-year-old child, testimony of defendant's former wife to effect that she went to office of justice court judge to sign warrant for arrest of defendant for child abuse was properly admitted as relating to conduct forming basis of indictment of murder.

Joel P. Walker, Jr., Hernando, for appellant.

A. F. Summer, Atty. Gen. by Robert D. Findley, Sp. Asst. Atty. Gen., Jackson for appellee.

En Banc.

BOWLING, Justice, for the Court:

Appellant's appeal is from a conviction of murder and a life sentence resulting therefrom in the Circuit Court of DeSoto County. Appellant advances four

assignments of error, namely:

1. The trial court erred in refusing to direct acquittal of the defendant because the second trial of the defendant put him twice in jeopardy for the same offense contrary to the Fifth and Fourteenth Amendment to the Constitution of the United States.

2. The trial court erred in requiring the defendant to be tried on a murder charge at the second trial when he was only convicted of manslaughter at the first trial, thereby putting him in double jeopardy for the same offense contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. The trial court erred in permitting the prosecution to call the former wife to testify at the second trial.

4. The trial court erred when it permitted the former wife to testify about going to Juvenile Court in Memphis, Tennessee,

and going to Olive Branch, Mississippi, to sign an affidavit against the defendant.

This is the second consideration of the case against appellant by this Court. In Tapp v. State, 347 So.2d 974 (Miss.1977), the Court reversed his conviction of manslaughter and his sentence of twenty years with the Department of Corrections. The reason for the Court's reversal and remanding for a new trial was that the lower court erred in compelling Tapp's wife to testify for the state over objections of both Tapp and the wife. In that case, Tapp was originally indicted for murder but was convicted of only manslaughter.

After remand and prior to the second trial resulting in this appeal, Tapp and his wife, Mary Jane, were divorced. At the second trial, she voluntarily appeared and testified against her former husband. The jury returned a verdict finding Tapp guilty of murder. The proof was abundant

and fully justified such a conviction. The testimony of his former wife was clear and concise that Tapp physically abused the two and a half year old son of the wife by a former marriage by throwing, hitting, stomping him, and doing other cruel and inhuman acts directed toward the child. The child died in the Baptist Hospital in Memphis after treatment and surgery, and the proof was positive that the child's death was the result of physical abuse. We relate the above to emphasize that the decision in this case is in no way based on the facts presented to the jury as to the guilt or innocence of appellant, but is based solely on required legal considerations.

ASSIGNMENT NO. 1. Appellant contends that a retrial on any charge after reversal of the first trial placed him in double jeopardy contrary to the Fifth and Fourteenth Amendments to the Constitution of

the United States. Subsequent to the second trial, the United States Supreme Court has rendered opinions in the cases of Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L. Ed.2d 15 (1978). In those cases it was held that an accused could not be placed in double jeopardy through a second trial when the first conviction was overturned for the reason that the prosecution did not present sufficient evidence and the conviction was against the overwhelming weight of the evidence. We clearly do not have that situation here. The opinion in Burks stated:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some

> fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.

[1] As hereinbefore stated, reversal of Tapp's conviction of manslaughter was because of the error of the lower court in the admission of evidence of the wife because of her marital status at that time. The reversal was based on trial error and not insufficiency of evidence. We, therefore, hold that Assignment No. 1 is without merit.

ASSIGNMENT NO. 2. It is contended that the second trial of appellant now before the Court should only have been under a charge of manslaughter. In at least three cases this Court has held that on reversal of a conviction the accused cannot be tried and convicted of a crime greater than that of which he was convicted at the first trial. Thornton v. State, 369 So.2d 505 (Miss. 1979); Varnado v.

State, 338 So.2d 1239 (Miss.1976); Wood v. State, 257 So.2d 193 (Miss.1972).

This prohibition is a constitutional right of an accused as stated by the United States Supreme Court in Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

[2] The primary question under this assignment is whether or not the appellant's right to raise this issue on appeal was sufficiently preserved in the lower court. The record reveals that prior to the beginning of the second trial, appellant, through his attorney, moved the court to try the case only under a charge of manslaughter. At the conclusion of the case the court was requested by appellant's attorney to charge the jury that it could consider only a verdict of manslaughter. This request was refused. We hold that this clearly was error and that under the above cited authorities and others, the

appellant legally and constitutionally could not have been placed in double jeopardy by trying him on a charge of murder from which he was released legally at his first trial.

[3,4] The question is what this Court should do to correct the error. All authorities heretofore have pointed out and it is obvious that the crime of manslaughter is a lesser crime than a charge of murder. In many cases, probably a majority, the jury is instructed in a trial under an indictment for murder that if murder is not proven, the jury, under proper instructions regarding the evidence, might find the accused guilty of the lesser crime of manslaughter. As hereinbefore stated, the jury in the present appeal found appellant guilty of murder and had abundant evidence to do so. We hold that because of the error of the lower court in not confining the jury deliberation to a

charge of manslaughter under the original indictment for murder, the cause should be remanded to the lower court for a sentencing hearing, limited to that under a charge and conviction of manslaughter. As in all such cases, it shall be within the discretion of the lower court to adjudicate the proper sentence after the sentencing hearing.

[5] ASSIGNMENT NO. 3. Appellant contends that the entire case should be reversed because the lower court admitted the testimony of his former wife. In Merritt v. State, 339 So.2d 1366 (Miss.1976), this Court held that the wife, although still married to the accused, was permitted to testify voluntarily as a competent witness against her husband for crimes involving personal violence against her child. As stated at the outset, at the first trial of the Tapp case resulting in the reversal, the wife was forced to testify, which made

that testimony incompetent. At the second trial, the witness was not the wife of the appellant, and in addition to that, she testified voluntarily. The admission of her testimony was not error.

[6] ASSIGNMENT NO. 4. Appellant's former wife was permitted to testify that she went to the office of a Justice Court Judge to sign a warrant for the arrest of appellant for child abuse. Appellant contends that as the charge against him was murder, evidence of a charge of child abuse was not permissible as an attempt to show another crime. This assignment is without merit. The testimony of the former wife merely relates to the conduct forming the basis of the indictment for murder. In addition, the record in this case clearly shows that there could have been no prejudice whatever against appellant because of this evidence.

The cause is affirmed and remanded to the lower court for a sentencing hearing and proper sentencing of appellant, not to exceed that under a charge of manslaughter.

AFFIRMED AND REMANDED.

SMITH and ROBERTSON, P. JJ., and SUGG, WALKER and LEE, JJ., concur.

PATTERSON, C. J., and BROOM, J., dissent.

COFER, J., takes no part.

PATTERSON, Chief Justice, dissenting:

I dissent, because I do not think legal salvage arises from an unconstitutional trial. In Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), a case strikingly similar to the present, it was held that double jeopardy prohibits a second trial for the same offense. It states in part the following:

> [T]he Double Jeopardy Clause of the Fifth Amendment is written in terms of potential or risks of trial and conviction, not punishment. (398 U.S.

at 329, 90 S.Ct. at 1761, 26 L.Ed.2d at 305)

* * * * * *

> The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly.
>
> . . .[10]
>
> [10]There is a significant difference to an accused whether he is being tried for murder or manslaughter. He has reason for concern as to the consequences in terms of stigma as well as penalty. He must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well.
>
> (398 U.S. at 331, 90 S.Ct. at 1762, 26 L.Ed.2d at 306)

If these statements mean what they say, then the second trial for murder should not have transpired; it was barred,* thereby leaving the verdict of murder and the sentence to life thereunder a nullity, in my opinion. A remand for sentence for the crime of manslaughter lends dignity to an

unconstitutional trial that I am not willing to share. I would remand the case for a new trial on manslaughter implicit in which is that no greater sentence could be imposed than that of the first trial.

A troublesome facet is now emerging from Merritt v. State, 339 So.2d 1366 (Miss.1976), wherein this Court held that a wife, although still married to the accused, was competent to testify against her husband for a crime involving personal violence against their child. This was permitted, because the wife was willing to testify. The first Tapp case was incorrectly decided under it, because Tapp's then wife was not willing to testify. In this, the second trial, she was divorced and volunteered to become a witness. Theoretically, she and Tapp could remarry before the third trial and she would again become an incompetent witness if she expressed a

desire not to testify against him. I now think we should give consideration to re-evaluating Merritt, supra, and Tapp v. State, 347 So.2d 974 (Miss.1977), its progeny, so that a spouse be either a competent or incompetent witness against the other spouse in a child abuse or homicide case, thereby removing the vacillations brought about by a spouse's willingness or unwillingness to testify.

BROOM, J., joins in this dissent.

*Kepner v. U.S., 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1903).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIAM E. TAPP,

Petitioner,

V. NO. DC 80-77-OS-P

ED LUCAS, WARDEN OR SUPERINTENDENT
OF THE MISSISSIPPI STATE DEPARTMENT
OF CORRECTIONS, ET AL,

Defendants.

REPORT AND RECOMMENDATION

In this petition for a writ of habeas corpus, petitioner William E. Tapp attacks the constitutionality of his February 17, 1978 murder conviction in DeSoto County Circuit Court. Petitioner contends that the trial in question placed him in jeopardy twice for the same offense in violation of the double jeopardy clause of the Fifth Amendment.

In November 1975, petitioner was indicted by the DeSoto County Grand Jury for the murder of his stepson. He was tried in

the same month, and was convicted of manslaughter. Upon appeal to the Mississippi Supreme Court, the conviction was reversed because the trial court erroneously compelled Tapp's wife to testify against him over the objection of both him and his wife. Tapp v. State, 347 So.2d 974 (Miss. 1977). Specifically addressing Tapp's assigned error that the verdict against him was contrary to the overwhelming weight of the evidence, the state court held that

> Without the wife's testimony, the record on the first trial of this case would not sustain a conviction. However, since that testimony is incompetent, the case will be reversed and remanded for a new trial upon such evidence as the State may be able to present.

Id. at 977

Over petitioner's objection, he was again tried for murder at retrial. Between the original trial and retrial, petitioner and his wife were divorced, and she voluntarily testified against him at re-

trial. On appeal after retrial, the Mississippi Supreme Court affirmed the conviction, rejecting petitioner's argument that the retrial was barred in toto by the double jeopardy clause, or alternatively, that retrial on the murder charge after initial conviction of manslaughter violated the double jeopardy clause and required yet another trial.

Between petitioner's retrial and affirmance of his conviction on appeal, the United States Supreme Court rendered two significant opinions concerning double jeopardy - - Burks v. United States, 437 U.S. 1, 57 L.Ed.2d 1 (1978), and Greene v. Massey, 437 U.S. 19, 57 L.Ed.2d 15 (1978). Clarifying a long-muddled legal principle, Burks held that the double jeopardy clause prohibits a second trial for the same offense once an appellate court has found the evidence legally insufficient to sus-

tain a conviction, as opposed to appellate reversal for trial error. Characterizing its reversal of petitioner's first conviction as based upon trial error, viz., "the error of the lower court in the admission of evidence of the wife because of her marital status", 373 So.2d at 1031, the Mississippi Supreme Court concluded that the double jeopardy clause did not preclude retrial of petitioner. Id.

With regard to petitioner's argument that the double jeopardy clause prohibited his retrial for murder after a prior conviction of the lesser included offense of manslaughter, the state court recognized that Price v. Georgia, 398 U.S. 323, 26L. Ed.2d 300 (1970), so held,[1/] and is con-

---

1/ "[T]he first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense. Price v. Georgia, supra, 398 U.S. at 327, 26L.Ed.2d at 304. The only distinction between Price and the case sub judice is that in Price, both juries returned manslaughter verdicts; however,

> Green v. United States, 355 U.S. 184, 2 L.Ed.2d 199 (1957), heavily relied upon in Price, is for all practical purposes factually identical fo the instant case.

trolling authority. The state court concluded, however, that a remand to the trial court for resentencing of petitioner for manslaughter would cure the double jeopardy problem since petitioner was convicted of murder at the second trial. This holding of the state court, as noted in the dissenting opinion, 373 So.2d at 1032-33, is based on a clear misinterpretation of Price v. Georgia, supra. In Price, the court rejected the argument that

> Because the petitioner was convicted of the same crime at both the first and second trials, and because he suffered no greater punishment on the subsequent conviction . . . the second jeopardy was harmless error . . . . .
>
> We must reject this contention. The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be

> charged and to be subjected to a second trial for first-degree murder is an ordeal not to be view lightly.

Price v. Georgia, 398 U.S. at 331, 26 L.Ed. 2d at 306. Retrial of petitioner for murder therefore violated his rights under the double jeopardy clause, and his conviction accordingly should be reversed and vacated.

With regard to petitioner's contention that the double jeopardy clause precluded any retrial subsequent to reversal of his initial conviction, the state court's holding that retrial was not barred because the reversal of petitioner's initial conviction was based on trial error fails to take account of its holding in its decision on Tapp's first appeal that "[w]ithout the wife's testimony, the record on the first trial of this case would not sustain a conviction." 347 So.2d at 977. That holding places the instant

action outside the holding of Burks, and squarely within the question left open in Greene, viz., whether the double jeopardy clause prohibits retrial where a reviewing court reverses a conviction, and

> the . . . justices thought that the legally competent evidence adduced at the first trial was insufficient to prove guilt. That is, they were of the opinion that once the inadmissible . . . evidence was discounted, there was insufficient evidence to permit the jury to convict.

Greene v. Massey, supra, 437 U.S. at 26, 57 L.Ed.2d at 22.

The magistrate's research has located only a single subsequent case addressing the question before the court and unresolved by Burks and Greene. In United States v. Santora, 600 F.2d 1317 (9 Cir. 1979), certain defendants appealed their convictions on the ground that illegally obtained wiretap evidence had been admitted in their trial. The Ninth Circuit found that such

evidence had been admitted as to defendant Cohn, and further held that "[s]ince Cohn's conversations must be suppressed, his conviction must be reversed for insufficient evidence. . . . Cohn cannot be retried (Greene v. Massey (1978) 437 U.S. 19, 98 S. Ct. 2851, 57 L.Ed.2d 15) . . . ." 600 F.2d at 1322.

The holding in Santora is consistent with the rationale of Burks as to retrial after reversal for insufficient evidence.

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against excessive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."

Burks v. United States, 437 U.S. at 11, 57

L.Ed.2d at 9-10 (citations omitted). On the other hand, whether the Government has proved its case is not a factor in the rationale permitting retrial upon reversal for trial error; the underlying consideration is society's interest that every accused not be set free simply because of any reversible legal error at trial, regardless of the sufficiency of the Government's proof of guilt. Burks v. United States, 437 U.S. at 15, 57 L.Ed.2d at 12. This consideration, however, has little, if any, force where the Government fails to prove its case by competent evidence, and indeed would not have presented evidence sufficient to prove its case had the incompetent evidence properly been excluded.

Based on the holding of the Mississippi Supreme Court that absent the inadmissible testimony of petitioner's then-wife, there was sufficient evidence to sustain peti-

tioner's initial conviction, 347 So.2d at 977, retrial of petitioner for the death of his stepson accordingly was barred by the double jeopardy clause of the Fifth Amendment.

For the foregoing reasons, it is recommended that the petition for a writ of habeas corpus be granted, and that a writ be issued vacating petitioner's conviction, and ordering his release from custody.

Respectfully submitted, this 22nd day of September, 1980.

/s/ Charles M. Powers
UNITED STATES MAGISTRATE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIAM E. TAPP,

Petitioner,

v. NO. DC 80-77-OS-P

ED LUCAS, et al,

Defendants.

ORDER

Upon due consideration of the petition for a writ of habeas corpus filed herein, the response thereto, and the Report and Recommendation of the United States Magistrate entered herein on September 22, 1980, no objections thereto having been filed by any party, the court finds that petitioner is entitled to habeas relief. It is, therefore

ORDERED:

(1) That the Report and Recommendation of the United States Magistrate is hereby adopted as the opinion of the court;

(2) That petitioner's February 18, 1978, murder conviction in DeSoto County Circuit Court is hereby reserved and vacated; and

(3) That respondents shall immediately release petitioner from custody.

This 15th day of October, 1980.

/s/ Orma R. Smith
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-3859

D. C. Docket No. DC 80-77-OS-P

WILLIAM E. TAPP,

Petitioner-Appellee,

versus

ED LUCAS, Warden, Mississippi State Penitentiary, Et Al.,

Respondents-Appellants,

Appeal from the United States District Court for the Northern District of Mississippi

Before CHARLES CLARK, TATE and SAM D. JOHNSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the judgment of said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions, in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the petitioner-appellee pay to respondents-appellants, the costs on appeal to be taxed by the Clerk of this Court.

OCTOBER 7, 1981

ISSUED AS MANDATE:

Opposition

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1050

In the Supreme Court of the United States

October Term, 1981

WILLIAM E. TAPP,
Petitioner,

vs.

ED LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

BILL ALLAIN, Attorney General
State of Mississippi
ROBERT D. FINDLEY
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QUESTIONS PRESENTED

I.

Whether the double jeopardy clause of the Fifth Amendment precluded a retrial of the Petitioner upon any charge whatsoever predicated upon the death of his stepson.

II.

Whether Petitioner's retrial upon the jeopardy-barred charge of murder precluded appellate affirmance of such conviction upon the lesser included offense of manslaughter.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATE STATUTORY PROVISIONS 2
STATEMENT OF THE CASE 2
REASONS FOR DENYING THE WRIT 3
CONCLUSION 6
CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

CASES

Graham v. Smith, 602 F.2d 1078 (2d Cir. 1979), cert. den. 444 U.S. 995, 100 S.Ct. 531, 62 L.Ed.2d 426 ..... 3, 5
Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) 3
Pacelli v. United States, 588 F.2d 370 (2d Cir. 1978), cert. den. 441 U.S. 908, 99 S.Ct. 2001, 60 L.Ed.2d 378 (1979) 3
Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) 3
Tapp v. State, 347 So.2d 974 (Miss. 1977) 1, 3
Tapp v. State, 373 So.2d 1029 (Miss. 1979) 1, 3
Tapp v. Lucas, 658 F.2d 383 (5th Cir. 1981) 1, 2, 3, 5

STATUTES

Miss. Code Ann. §13-1-5 (1972) 2

No. 81-1050

In the Supreme Court of the United States

October Term, 1981

WILLIAM E. TAPP,
Petitioner,

vs.

ED LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion rendered by the Supreme Court of Mississippi in Petitioner's appeal from an initial conviction of manslaughter is reported as *Tapp v. State*, 347 So.2d 974 (Miss. 1977). The decision rendered in Petitioner's subsequent appeal of that murder conviction which resulted from his retrial under the original indictment is reported as *Tapp v. State*, 373 So.2d 1029 (Miss. 1979). The opinion of the United States Court of Appeals for the Fifth Circuit (Petitioner's Appendix "A") is reported as *Tapp v. Lucas*, 658 F.2d 383 (5th Cir. 1981).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has sufficiently identified and set forth the constitutional provisions involved in this cause.

STATE STATUTORY PROVISIONS

As in force and effect at the time of Petitioner's initial trial upon the charge laid in the indictment, §13-1-5, Mississippi Code Annotated (1972), provided:

> Husbands and wives may be introduced by each other as witnesses in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them. A criminal prosecution of either husband or wife for contributing to the neglect or delinquency of a child or desertion or nonsupport of children under the age of sixteen (16) years or abandonment of children shall be deemed controversies between husband and wife for the purpose of this section. *But in all other instances where either of them is a party litigant the other shall not be competent as a witness* and shall not be required to answer interrogatories or to make discovery of any matters involved in any such other instances *without the consent of both.* (Emphasis added)

STATEMENT OF THE CASE

The essential facts of this case as set forth in the opinion of the Court of Appeals in *Tapp v. Lucas,* 658 F.2d 383 (5th Cir. 1981) are correct and are adopted here.

REASONS FOR DENYING THE WRIT

The Mississippi Supreme Court in *Tapp v. State*, 373 So.2d 1029, 1031 (Miss. 1979) specifically rejected the Petitioner's contention that its prior reversal in *Tapp v. State*, 347 So.2d 974 (Miss. 1977) was predicated upon any basis other than that of trial error. That deference accorded the state court's delineation of its prior decision in this cause is fully consistent with this Court's disposition in *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). The Court of Appeals therefore properly concluded that the issue pretermitted in *Greene* was not here presented and that Petitioner's retrial was not precluded by the double jeopardy clause. *Tapp v. Lucas*, 658 F.2d 383, 385 (5th Cir. 1981).

Petitioner further contends that Mississippi Supreme Court's ruling affirming his subsequent conviction and remanding the cause for resentencing upon the lesser included offense of manslaughter was based upon a clear misinterpretation of *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970). *Price*, however did not establish a *per se* rule requiring the automatic reversal of any conviction upon a charge which was joined at the trial level with a jeopardy-barred charge. *Pacelli v. United States*, 588 F.2d 370 (2d Cir. 1978), cert. den. 441 U.S. 908, 99 S.Ct. 2001, 60 L.Ed.2d 378 (1979). Appropriate appellate disposition must instead be determined upon an evaluation of the possible prejudicial effects of such joinder. *Ibid.*

The factual circumstances of the cause sub judice are remarkably similar in many respects to those with which the court in *Graham v. Smith*, 602 F.2d 1078 (2d Cir. 1979), cert. den. 444 U.S. 995, 100 S.Ct. 531, 62 L.Ed.2d 426, was confronted:

The interesting question is whether the prosecutor's unconstitutional action in trying Graham a second time for second degree murder, for which no valid conviction could have been obtained, also invalidates the conviction for first degree manslaughter to which the Appellate Division reduced it, with the subsequent approval of the Court of Appeals. It would seem that if the State had tried Graham before the jury and the open first degree manslaughter charge and the jury had convicted of the latter, the conviction could not stand. *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965) (Marshall, J.) cert. denied, 383 U.S. 913, 86 S.Ct. 896, 15 L.Ed.2d 667 (1966); *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970). It is equally plain that if after our habeas corpus decision, 457 F.2d 463, the State had prosecuted Graham only for first degree manslaughter and the jury had convicted, the double jeopardy clause would provide Graham no relief. The question is how the matter stands when, on the basis of sufficient untainted evidence, the jury has convicted of the greater offense and a reviewing court has reduced the conviction to what would have been permissible in a prosecution solely for the lesser offense.

While there is language in *Hetenyi* and *Price* that might suggest that the State must be deprived of any conviction on a trial that had included a charge barred by double jeopardy, we do not believe the courts intended to go so far. See *Pacelli v. United States*, 588 F.2d 360, 366 (2d Cir.), cert. denied, 434 U.S. 1010, 98 S.Ct. 721, 54 L.Ed.2d 753 (1978). A sufficient basis for the *Hetenyi* and *Price* decisions was that the presence of the barred more serious charge created a serious risk that the jury in *Hetenyi* might have been led to compromise on a more rather than a less serious un-

barred charge, e.g. second degree murder rather than first degree manslaughter, see 348 F.2d at 865-66, or in *Price*, to have convicted on a lesser included offense, voluntary manslaughter, rather than to have acquitted or hung, see 398 U.S. at 331, 90 S.Ct. 1757. On that view Graham's case is distinguishable; the jury convicted on the more serious charge and there is thus no indication that the verdict was a compromise resulting from inclusion of the barred charge. Even more clearly we could not assume that, in taking the action that they did, the Appellate Division and the Court of Appeals were influenced by the presence of a charge they had held to be barred by the double jeopardy.

While the fear of a compromise verdict was the principal basis for *Hetenyi*, the opinion did not stop with this. It said that when a barred charge is included, "[t]he question is not whether the accused was actually prejudiced, but whether there is *reasonable possibility* that he was prejudiced," 348 F.2d at 864 (emphasis in original). [footnotes omitted.]

(602 F.2d at 1082-1083)

The Petitioner does not assert the existence of any actual prejudice resulting from the improper joinder of the jeopardy-barred charge. Nor, as found by the Court of Appeals, does the record herein afford any basis for concluding that there in fact existed a reasonable possibility that the Petitioner was prejudiced by such joinder. *Tapp v. Lucas*, 658 F.2d 383, 386 (5th Cir. 1981).

Thus, Petitioner's present claims were afforded full consideration below and that court's resolution of these issues is not at variance with the applicable decisions of this Court.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert D. Findley, Counsel of Record for the Respondents herein, do hereby certify that I have this day caused three (3) true and correct copies of the above and foregoing Brief in Opposition to Petition for a Writ of Certiorari to be served upon Robert G. Gilder, Esquire, Post Office Box 193, Southaven, Mississippi 38671.

This, the 13th day of April, A.D., 1982.

ROBERT D. FINDLEY
Special Assistant Attorney General
State of Mississippi